STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2006
v	No. 264180 Oakland Circuit Court
FRITZ ADAM BADENHOOP, Defendant-Appellant.	LC No. 04-199986-FH

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant was convicted of OUIL with an occupant under 16, MCL 257.625(7)(a), and leaving the scene of an accident, MCL 257.618, and sentenced to two years' probation, the first 273 days in jail, for the OUIL with occupant under 16-second conviction, MCL 257.625(a)(ii), and 90 days in jail for the leaving the scene of an accident conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that he was denied the effective assistance of counsel as a result of defense counsel's failure to call his son as a witness. We disagree. When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that this performance was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), quoting *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must show a reasonable probability that, but for counsel's error, the outcome would have been different. *Id*. A defendant must overcome the strong presumption that his counsel engaged in sound trial strategy. *Id*.

Decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Dixon*, *supra* at 398. A substantial defense is one that might have made a difference in the outcome of the trial. *Id.*

Defendant contends that, if his son had testified, there would have been reasonable doubt regarding whether defendant was driving the ATV and was drunk at the time of the accident, and therefore, a different outcome was probable. Defendant claims witnesses were mistaken regarding who was driving the ATV because, after the accident, defendant was still on the ATV while the son was thrown off. Defendant argues that there was no evidence to show he was over the legal blood alcohol content (BAC) limit while operating the ATV, and his son would have testified that defendant drank alcohol only after the accident.

First, there is nothing in the existing record to support defendant's assertion that his son was driving the ATV. On the contrary, three witnesses testified defendant was driving the ATV, and no evidence was presented that defendant's son was driving. Second, there is nothing in the record indicating that defendant's son was with defendant at any time prior to being on the ATV with him, and therefore, the record does not support the claim that defendant's son could have testified regarding the timing of defendant's drinking. Rather, the record supports that defendant was intoxicated at the time of the accident. While defendant's ex-stepfather testified that defendant only became intoxicated afterward,[1] two unbiased witnesses testified that he was intoxicated at the time. Thus, reviewing the existing record, defendant has not overcome the strong presumption that defense counsel was engaging in sound trial strategy.

Defendant also argues on appeal that there was insufficient evidence to convict him of OUIL with an occupant under 16. We disagree. When reviewing a claim of insufficient evidence de novo, this Court views the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Defendant was convicted of violating MCL 257.625(7), which prohibits operating a motor vehicle in violation of MCL 257.625(1) while another person who is less than 16 years old is occupying the vehicle. MCL 257.625(1), operating a motor vehicle while under the influence of intoxicating liquor (OUIL), means "a defendant's ability to drive was substantially and materially affected by consumption of intoxicating liquor," *People v Fett*, 261 Mich App 638, 640; 684 NW2d 369 (2004), quoting *People v Lambert*, 395 Mich 296, 305; 235 NW2d 338 (1975), or the person had a BAC of .08 or more while operating a vehicle.

Defendant argues that there was no evidence that he was drunk at the time of the accident since no evidence was presented that defendant was drinking prior to the accident, and no field test, breathalyzer, or blood draw was obtained immediately after the accident. However, defendant discounts the testimony of two witnesses to the accident that defendant was drunk at the time of the accident. Testimony was given that defendant was slurring his words and was "wobbly" on the ATV. Furthermore, two police officers testified that defendant was intoxicated when they arrived at his residence, approximately 40 minutes after the accident, and there was no evidence that a large quantity of alcohol had been consumed within the prior 40 minutes.

[1] To believe defendant's ex-stepfather, this Court would have to believe that defendant consumed enough alcohol, in less than 40 minutes, that he would still have a BAC of .21 almost three hours later.

It is the province of the jury to determine the credibility of witnesses and the weight of evidence. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Therefore, it is proper that the jury chose to believe two unbiased witnesses and two police officers rather than defendant's ex-stepfather. Thus, in viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of OUIL with an occupant under 16.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens